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Issue Date: 13 November 2003

CASE NOS. 2003-CAA-11
2003-CAA-19
2004-CAA-1

IN THE MATTER OF

SHARYN A. ERICKSON,
Complainant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION IV, ATLANTA, GEORGIA,
Respondent

APPEARANCES:

Edward Slavin, Jr., Esq.
On behalf of Complainant

Robin B. Allen, Esq,.
Karol Berrien, Esq.,
On behalf of Respondent

Before: Clement J. Kennington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Procedural History

The parties have a long and well documented history of adversarial legal relations commencing in the 1990's with Complainant filing eleven environmental whistleblowing complaints against Respondent, entitled *In the Matter of Sharyn Erickson v. U.S. Environmental Protection Agency, Region 4, Atlanta, Georgia & EPA Inspector General (Erickson I)* Case Nos.: 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3 and 2002-CAA-18. Following a lengthy hearing, the Court, on September 24, 2002, issued a 100 page Recommended Decision and Order (RDO), finding in part for Complainant on issues of adverse employment and hostile working conditions.

The RDO found that Respondent (EPA and EPA Inspector General) had discriminated against Complainant by: **(1)** canceling Complainant's contracting warrant, transferring her to a different job, attempting to bias an Office of the Inspector General (OIG) investigation into Complainant's activities, and leaving Complainant under the impression that she was subject to a "gag order"; **(2)** refusing to disclose the results of the OIG investigation to Complainant after Complainant had requested such information and Respondent knew that the OIG investigation had failed to produce evidence meriting any prosecution of Complainant; **(3)** placing Complainant in a job as the Information Resources Coordinator which she was not qualified to perform, keeping her in that position having knowledge that she was unqualified, when her lack of qualifications helped create a hostile work environment perpetuated by the work assignment managers that Complainant had the responsibility of supervising; and **(4)** not ameliorating the hostile work conditions perpetuated by her work assignment managers. As a result of Respondent's conduct, the Court ordered that Complainant be reinstated to a contracting position and receive a pay increase from a GS-12 to GS-13, back pay, compensatory damages, equitable relief in the form of an appropriate posting and exemplary damages.

This proceeding (*Erickson II)* involves seven (7) complaints filed on October 9, 2002; March 11 and 24, 2003; April 28, 2003; June 2, 2003; September 3, 2003; and October 1, 2003 by Complainant against Respondent pursuant to employee protection provisions of the Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9(i); Water Pollution Control Act (WPCA) 33 U.S.C. § 1367; Solid Waste Disposal Act (SWDA) 42 U.S.C. § 6971; Clean Air Act (CAA) 42 U.S.C. § 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9610.[1]

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[1] Complainant sought to include EPA Inspector General (Respondent OIG) in *Erickson II*. Respondent OIG appealed on the grounds that they had taken no action in this case other than appeal the Recommended Decision and Order in *Erickson I.* Since Complainant had no evidence of any discriminatory conduct towards Complainant in *Erickson II*, and Respondent OIG was not an indispensible party in that proceeding, the Court issued an *Order Dismissing EPA Inspector General from the Case* on April 21, 2003. Complainant's attempt to subject Respondent to the provisions of the Toxic Substance Control Act, 15 U.S.C. § 2622, was likewise rejected, inasmuch as Respondent never waived its grant of sovereign immunity. *See Stephenson v. NASA*, 11994-TSC-5 (ALJ June 27, 1994); *Mackey v. U.S. Marine Corps.*, 1999-WPC-6 (ALJ July 13, 1999).

Complainant also sought to include various supervisors as named respondents in this case so as to hold them jointly and severally liable for their acts of discrimination against Complainant. The Court denies this motion; the proper party in this case is the U.S. Environmental Protection Agency, Region IV, Atlanta, Georgia. If violations as identified herein are upheld on appeal, Respondent can remedy all infractions.

The Court grants Complainant's motion to consolidate her October 1, 2003, complaint with the previous six (6), in which she seeks to include Respondent's Counsel, Robin B. Allen, as a

While *Erickson II* is factually and legally less complicated than *Erickson I*, it nonetheless contains multiple adverse employment and hostile work allegations, chief of which was Respondent's assignment of Project Officer duties to Complainant. This and eighteen (18) other allegations constitute the substance of Complainant's case against Respondent, including:

1. Disparate surveillance and unfounded criticisms of Complainant concerning lateness for work and bathroom habits;

2. Idling, bypassing, and undermining Complainant's authority;

3. Inappropriate supervision of Complainant regarding contractor changes to the Administrative Office (AO) program by non-supervisor Carolyn White who is at the same grade level as Complainant;

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person responsible for blacklisting Complainant by referring to her on three (3) separate occasions in Respondent's post-hearing brief as being insubordinate, when none of Respondent's supervisors, including Barrow, accused her of such misconduct. (Tr. 1825, 1826). However, after reviewing the parties' positions in this matter, the Court finds no basis in law for finding any discriminatory action by Respondent's Counsel when she referred to Complainant in her brief as insubordinate.

Complainant cites no precedent in support of her position. In contrast, the United States Supreme Court has held that a government agency's attorney has "an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding." *Imbler v. Pachtman,* 424 U.S. 409, 426, n. 23 (1976); *see also Butz v. Economou,* 98 S.Ct. 2894 (1978). As such, the government's attorney is fully immune from prosecution for statements made in the course of representation; nor can such statements constitute illegal actions of the agency itself. Furthermore, the Court finds such conduct to constitute nothing more than an unwarranted personal attack on Respondent's Counsel designed to waste time and make Respondent's counsel a witness thereby depriving Respondent of effective representation. Accordingly, the Court dismisses Complainant's 7th complaint.

Following the hearing on this complaint, the undersigned set a due date for post-hearing briefs on October 22, 2003. On the afternoon of October 21, 2003, Complainant filed a Motion for Enlargement of Time to file her brief, stating she "has still not yet received the transcript, which she must cite in her brief." (See Complainant's Renewed Motion for Enlargement of Time, p. 1, October 21, 2003). However, as Complainant did not specify the date on which she requested the transcript, it must be presumed the transcript was made available to her on October 16, 2003, the same day it was received by the Court. This is sufficient time in which to produce an adequate post-hearing brief. Moreover, Complainant was not required to cite the transcript in her post-hearing brief, thus, receipt of the transcript should not affect the timeliness of her brief. (Tr. 1916). The Court therefore denies Complainant's Motion for Enlargement of Time.

4. Attempts to assign Complainant lower level clerical work;

5. Refusal to reassign Complainant contracting duties as ordered by the September 24, 2002, RDO or abide by any order in that RDO while hiring a new contract specialist;

6. Filing frivolous petitions for review of RDO;

7. On November 6, 2002, Assistant Regional Administrator, Russell L. Wright, at a meeting of about 150 employees from the Office of Policy and Management, publically humiliated, blacklisted, coerced and intimidated Complainant when she asked questions about her outstanding complaints against Respondent, by responding that the RDO was irrelevant, or simply a suggestion, and stated that people who "dragged their heels," or continued to raise old issues instead of whole-heartedly supporting the new team's direction, would be left behind to their detriment;

8. Falsely criticizing Complainant during her annual evaluation of accusing another employee, Tom Ferris, of illegal actions;

9. Allowing accounting personnel Thaddeus Allen, Patty Bettencourt and Jeffery Marsala to make false accusations against Complainant concerning her willingness to learn;

10. Keeping essential job information from Complainant concerning the timely tracking of fund balances on the GSA Inter-government Agency Agreement (IAG);

11. Assigning, changing and conflicting work assignments, and then blaming Complainant for trying to carry them out;

12. Unjustly criticizing Complainant's work product as being too detailed and at the same time lacking in sufficient detail;

13. Refusing to implement any order set forth in the September 24, 2002, RDO, filing frivolous appeals and false briefs, advising management to sandbag Complainant, and continuing to engage in unfair litigation

tactics, including continued opposition to Complainant's petition for attorney fees;[2]

14. Refusing to resume past practices of allowing Complainant to work a regular, flexiplace schedule;

15. Falsely accusing Complainant of not following instructions when Supervisor Ron Barrow, on March 19, 2003, criticized Complainant of not telling contractors about COOP and Shelter-In-Place instructions, which Complainant had done the previous day when she talked with ACS task leader Debbie Counge and CSC task leader Derrick Daniel and left messages for the ACS and CSC (formerly Dyntel) group manager;

16. Criticizing Complainant for being late to work when Supervisor Ron Barrow, on March 20, 2003, interrogated Complainant for being late for work when Respondent created this situation by sending certified

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[2] In her brief, Complainant asserted that Respondent perpetuated a hostile work environment by: (a) refusing to read the RDO, and thus, engaging in willful blindness; (b) refusing to revoke a previous illegal gag order described at pages 63, 80-83 of the RDO; (c) refusing to reinstate Complainant to a contracting position after improperly canceling her contract warrant and transferring her to Information Management Branch; (d) excluding her from a Region 4, Laboratory Information Management System meeting; (e)delaying her mid-year evaluation; (f) accusing her of disruptive conduct at an Integrated Grants Management System meeting in April 2003; (g) criticizing her for not being a team player, but rather, being negative and finger pointing; (h) subjecting her to ridicule; (i) denying her flexiplace; (j) covertly trying to revoke her project officer duties due to her e-mail and trying to force transfer her out of the Information Management Branch.

With the exception of those allegations already found objectionable in the RDO (allegations (b) and (c)), the Court finds no credible evidence of any hostile work environment involving allegations (a) and (d) through (i). Respondent's supervisors are free to read or not read the RDO. However, failure to read it will not excuse their actions if found objectionable by the Administrative Review Board. Concerning allegation (d), the record shows that Respondent had a meeting in early July, 2003, concerning the R4 LIM, a complex data base laboratory information system. Complainant was not invited to the meeting because of a lack of technical expertise and managerial status. Once management approved of the system, Complainant was fully involved with its implementation. (Tr. 1309-1333). Concerning allegation (e), Respondent produced no direct evidence of any disruptive behavior and took no action against Complainant because of such conduct. Criticism of Complainant as being negative, not a team player, and pointing fingers, even if made as alleged, does not constitute severe or pervasive harassment so as to alter terms and conditions of employment, and thus, create a hostile work environment.

mail to her residence requiring her to retrieve such during working hours;

17. Refusing to place Complainant in one of two full time GS-12 contract specialist positions for which she applied in April, 2003;

18. Confiscating 9 hours of Complainant's annual leave on May 14, 2003, effective retroactively to May 8, 2003, by Supervisor Barrow, despite the fact Complainant had informed Barrow she worked more than 9 hours on two previous days of annual leave.[3]

The hearing on *Erickson II* commenced on May 13, 2003, in Atlanta, Georgia, and ran for 4 days, until May 16, 2003, followed by three (3) additional days of testimony on July 29, 30, and October 2003. The following witnesses testified at the second hearing: **James Irvin Palmer** (Regional Administrator); **Stanley Meiberg** (Deputy Regional Administrator); **Gregory Allen Farmer** (Deputy Assistant Regional Manager); **James Russell Wright** (Assistant Regional Administrator and Director of Office of Policy and Management); **Matthew James Robbins** (Chief of Grants and Procurement Branch, Office of Policy and Management); **Ed Springer** (Chief of Grants, IAG and Audit Management Section; **Janice Nash Bramlett** (Regional Comptroller); **Patty Bettencourt** (Supervisory Budget Officer); **Thaddeus Allen** (Senior Budget Analyst); **Ronald L. Barrow** (Chief, Information Management Branch); **Janice Bramlett** (Branch Chief, Comptroller Office); **Harriet Yancey** (Grants Management Specialist); **Keith Mills** (Head of Procurement Section); **Carolyn McCray White** (Information Management Specialist); **Beverly Brennan** (Information Security Officer); **Maurice Holbert Holmes** (Personnel Staffing Specialist); **Jeffery Marsala** (Finance Officer and Accountant, EPA Finance Center in Cincinnati, Ohio); **Rafael Santamaria** (former Equal Employment Opportunity Officer); **Carolyn White** (Information Management Specialist); **James Couch** (Computer Specialist); **Drunell R. Williams** (telecommunications Specialist); **Sharyn Erickson** (Complainant and Information Resources Coordinator); **Debra Eastis** (GSA Senior Finance Manager); and **Richard Sheckell** (PC Coordinator).[4]

II. Hostile Work Conditions and Adverse Employment Actions

II A. Assignment of Project Office Duties

As noted at pages 33-39 of the RDO in *Erickson I*, Respondent assigned Complainant to the Information Management Branch in March, 1995, under the initial supervision of Jack Sweeny and then, in 1996, under the supervision of Barrow who replaced Sweeny as Branch Chief. There, she was

[3] Complainant presented no credible evidence on allegations numbers 4, 6, 9, 11 and 14.

[4] For sake of brevity, witnesses are referred to only by their last name.

given the title of Information Resources Coordinator and charged with management of an information resources contracts. In addition, she was appointed Project Officer over an inter-agency agreement (IAG) which required preparation of procurement requests and funding packages, monitoring technical contractor performance, and the approval and prioritizing of work assignments. (Tr.49-51, 67, 79, 1305).

Although Respondent used IAGs at other locations than Region 4, the IAG in question was far more complex than other IAGs in that it covered all computer-work for Respondent's 1200 employees, and had been amended or modified more than 30 times since its inception in 1993. Complainant was ill-suited for administration of this IAG because of minimal computer training combined with a refusal by work assignment managers who understood the technical aspects of the computer work to verify either the hours or nature of work performed by computer contractors. (Tr. 204-206, 317, 1122-1123).

According to the IAG in question, Complainant as Project Officer, was required to certify the accuracy of bills submitted by contractors (ACS and Dynatel {CSC}) for computer services and allocate them against particular funding accounts. Once the bill was certified, GSA paid the contractor and submitted the bill and an administrative handling fee to Respondent, who in turn, paid the charges through an automatic payment system, the Internet Payment and Correction System (IPAC). (Tr. 53, 54, 63, 64, 78, 81-85).

Complainant was unable to do this work properly because of a lack of: (1) accounting codes on the bills describing tasks performed; (2) computer expertise; (3) communication with work assignment managers and contractors; and (4) timely billing and notice of fund transfers resulting in a series of e-mails between budget, finance, and Complainant and delayed contractor payments. (Tr. 50-58, 67, 71, 79, 86-88, 96, 106, 108, 110-113, 115, 121, 124,126; CX-69). Faced with a lack of necessary information, Complainant either certified the bills blindly or later refused to sign any bills because she was concerned about possible criminal prosecution under the Anti-Deficiency Act, 31 U.S.C.§ 1341 *et. seq.* for authorizing payment without necessary funding to support such payments. (Tr. 134, 135, 188, 1124-1128). As of the initial hearing date, Complainant had refused to sign thirty one (31) outstanding bills because of an inability to track costs. (Tr. 109, 110). In addition, Complainant was unable to ascertain fund balances notwithstanding her access to funding data over Respondent's financial warehouse web site due to a lack of initial balances and accounting codes match working performed to funding sources. (Tr. 192-195).

In attempting to do her Project Officer duties, Complainant sought help from Marsala, a finance officer and accountant with Respondent's Cincinnati Finance Center, who in turn was responsible for making sure the contractor bills were paid and that Project Officers properly verified and allocated costs. (Tr.45-50). On August 28, 2002, Complainant e-mailed Marsala stating, that she was unable to track old IGA billings because of limited information. Marsala replied that he could not tell her how to allocate bills and it was up to her office to figure out how to do so. (CX-69, p. 3). Subsequent e-mails in September, 2002, between Allen, Barrow, and Complainant resulted in a meeting in Complainant's office on September 12, 2002, with Rebecca Kemp, Allen, and Bettencourt.

As a result, Complainant was able to process $600,000.00 in bills and credits but still was unable to resolve "huge discrepancies" between EPA and GSA accounting systems. (CX-69, pp. 7-21).

Accounting problems continued the following year, with the ACS contractors failing to be paid for nearly four months and considering pulling their employees off the job. (CX-69, pp. 23, 26). Allen, Senior Budget Analyst, acknowledged having problems with getting timely and accurate information from GSA, and admitted that if he approved payment of funds without the funds being available he could be subject to incarceration under the Anti-Deficiency Act. (Tr. 133-135, 143, 542). At Barrow's request, Allen and another Accountant, Ferrazoula, developed a spread sheet with contractor names and hourly rates using information from the Financial Data Warehouse, a website creation of EPA, to help Complainant match tasks to bills. (Tr. 637-638). However, specific information associating accounting codes to tasks was apparently not available to Allen when he created the spread sheet; rather he depended upon the Project Officer to know the work in question and allocate it to the proper account. (Tr. 165-167, 175,176, 192-195). Allen even attempted to reconcile account balances with Debbie Eastis of GSA, but was apparently unsuccessful in getting Eastis to do her part. (Tr. 170).

Adding to Complainant's job difficulties, was the fact that the IAG in question had never been audited or reconciled since its inception in 1993. When the audit was completed in June, 2000, it resulted in Respondent being credited with $1,500,000 in overpayments. (Tr. 522-525). As a result, Respondent decided to reduce the funding by approximately $500,000 each year from the normal budget of $1,000,000, thereby achieving a reduction of the surplus over a three year period. (Tr. 319-322, 604-620). A second reconciliation was performed about 1½ years later, at Barrow's request, because of difficulties that Complainant was having in tracking or associating costs with work performed. (Tr. 637). As discussed, *infra*, in Section II B, Respondent withheld details of the reconciliations from Complainant. (Tr. 620-622, 1586, 1587). GSA added to the problem by failing to require contractors to supply codes for what they had done further. (Tr. 596-600, 626-632). Indeed, it took Respondent's accounting staff hundreds of hours to reconcile account balances. (Tr. 589, 590).

Despite repeated e-mails between Complainant and various management officials, the tracking problem remained. A review of sample bill invoices as of April 4, 2003, from one of the main EPA contractors (Dnycorp), showed current bills rates, hours, and order numbers, but failed to identify specific tasks. Monthly task status reports also failed to associate costs with specific work assignments. (CX-69, pp. 146-200; CX-79, pp. 19, 21, 26, 27, 45, 46). Faced with deficient accounting records, a lack of computer expertise and a refusal by work assignment managers to communicate with her, Complainant found herself face-to-face with an impossible job assignment of trying to verify and approve contractor invoices. (CX-69, pp. 133, 157, 549-550).[5]

[5] When asked how she approved contractor invoices, Complainant admitted that she had to certify them blindly. (Tr. 1554).

Barrow agreed with Complainant's inability to track funds and set up a meeting with Allen, Bettencourt, Kemp, and Complainant in September, 2002, but the problem persisted. (CX-69, pp. 6, 11; CX-79, pp. 5, 8, 9, 26). Barrow admitted the problem of tracking funds was difficult if not insoluble, causing a strain in working relationships between various departmental personnel. (Tr.1122-1125, 1373, 1374). Barrow acknowledged receiving a request from Comptroller, Bramlett, to reassign Project Officer duties to another person, but stated, that he had no one else who could do the work besides Complainant. (Tr. 988- 990, 1018). Barrow, however, did approach Wright, Assistant Regional Manager, in an attempt to secure a reassignment for Complainant, but was told to keep Complainant where she was until all litigation was completed. (Tr. 1091). Barrow attributed part of Complainant's difficulty in performing Project Officer duties, her behavior, i.e., pointing fingers, or assigning blame to other employees rather than working as team player to try to reach a solution to a very difficult problem. (Tr. 1100-1005, 1138,1160, 1161).[6]

On June 11, 2003, Barrow e-mailed Complainant advising her approximately 35 contractor bills had been received by GSA since January 1, 2003, which she needed to review and approve. For those tasks performed under the old IAG (DW-47-94-5609), which were performed before its expiration on December 31, 2002, Complainant was to review and approve those bills if the work had been done and the hours cost were reasonable, without having to allocate these costs to specific budget accounts. Further, Barrow directed Complainant to draft a memo extending the old IAG until September 30, 2003, so as to avoid a lapse in funding. Complainant was to review and approve, if appropriate, 3 additional bills against the new IAG (DW-47-94-5935), allocating those amounts to

[6] Although not alleged in her complaints, Complainant asserted that Respondent asked her to perform ill-advised and impossible tasks, such as adding clauses to contracts requiring contractors to perform security background checks on their own employees. Indeed, Beverly Brennan asked Complainant to help her with this task to which Complainant responded by citing a number of problems associated with this task. (RX-28, p.5; RX-33, 38, 41, 42). Brennan and other employees were assigned this job by EPA Headquarters in response to the Government Information Security Reform Act, which required all agencies to file an annual report with OPM regarding their security program. Brennan acknowledged that Complainant raised a number of valid concerns and objections to having contractors do their own security checks, with the end result being that OPM continued to perform such checks. (Tr. 756-797; CX-70, pp. 4, 15, 30, 32, 40). On May 27, 2003, Complainant e-mailed Barrow complaining about being asked to perform an impossible task of adding contract language requiring contractors, in essence, to provide background checks for their, as well as, their subcontractor's employees as published in the Federal Register and then reporting compliance when in fact she could do neither. Complainant asked Barrow to reassign the task, which he did. (CX-70A, pp. 1 and 2). Barrow admitted the difficulty of doing this work, but said it was not impossible and had been assigned to other EPA regions, and that Complainant raised valid objections to the assignment. (Tr. 1409-1411, RX-32).

specific budget accounts. Barrow directed this action after a phone conversation with Marsala on June 10, 2003, followed by a meeting with Yancey and Springer. (Tr.1398-1403).[7]

Complainant replied that such action would not resolve Respondent's problems, but would increase liability, by resulting in two IAGs for the same work with the exact same agency and contractors, with possible double billing and violations of the Anti-Deficiency Act and other federal laws. Accordingly, without approval from higher authority, Complainant refused to do as directed, whereupon Barrow assigned the task to Rick Sheckell. In about a week, Sheckell had approved all bills against the old IAG, although he was unable to tell what bills went with what work. (Tr. 1402-1409, 1441-1443).[8] When approving contractor bills in the past, Complainant certified contractor work and hours blindly, i.e., without knowing what had been done. This was due in large part to a refusal by work assignment managers to tell Complainant what work contractors had performed.. (Tr. 1544-1545).[9]

Respondent assigned Complainant Project Officer duties knowing full well that she lacked the necessary computer expertise to evaluate what work contractors had performed, and further, had no way to receive such information because of a refusal by work assignment managers to tell her what had been done. Respondent proffered no reason for this assignment nor its refusal to reassign her to other duties. Such an assignment can only be described as pervasive harassment constituting adverse action and hostile working conditions.

II B. Withholding of Information on IAG Funding (Allegation # 10)

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[7] Barrow admitted that Complainant was dependent upon work assignment managers over ACS and Dynatel to tell her how much and what work was done by these contractors, and that if the work assignment managers refused to talk with Complainant, she would have no way of learning what services had been provided. (Tr. 1449-1451).

[8] Both Respondent and its contractors were concerned about the timely payment of IAG bills. Respondent's Office of Inspector General had criticized Respondent for untimely payment approvals since 1998, while contractor ACS noted a deficiency of $237,016.36 in funding for work performed in June, 2003. (CX-69A, pp.10, 19-23). Unlike Complainant, Shekell had a background in computers and a direct working relationship with Respondent's contractors, thus he was in a better position to ascertain what the contractors had in fact done.

[9] In its brief, Respondent contended that Barrow repeatedly told work assignment managers not to bypass, but to go directly to, Complainant. Work assignment managers corrborated Barrow's testimony. Indeed, the only work assignment manager who testified, Carolyn White, denied this fact. (Tr. 744-745). Accordingly, I do not credit Barrow on his assertion that he instructed work assignment managers to deal with Complainant directly and not bypass her.

Besides needing to know what work contractors performed on given task, Complainant, as Project Officer, needed to know fund balances so as to avoid approving expenditures without sufficient funds and running afoul of the Anti-Deficiency Act. Complainant alleges that funding information was deliberately withheld from her so as to make her job more difficult, and that she was specifically prohibited from talking to Eastis or Spratling about such issues. Comptroller, Bramlett, who was responsible for having a 7 year reconciliation or audit of IAG funds that resulted in a $1,500,000 credit to EPA, admitted that she instructed those connected with the audit not to provide Complainant with the result of the audit. Rather, she instructed Complainant to organize her office, keep folders of invoices, and fill in a schedule that Allen had developed. (Tr. 620-622). Bramlett knew, moreover, that Complainant was having difficulty with tracking funds even after a second reconciliation was performed in July, 2000, but took no apparent action to provide her with that information other than to encourage use of a spreadsheet developed by Rich Farrazoula and Allen. (Tr. 637-638). Bramlett knew that Complainant was concerned about approving expenditures without available funds. (Tr. 649, 655, 656).

Complainant credibly testified that she never received funding information from the second reconciliation. (Tr. 1585-1587). Indeed, the record is replete with Complainant seeking, but not receiving funding information on a timely basis.[10] Complainant learned of fund transfers only after the fact. (Tr. 1573-1575). An example of this lack of information can be seen in CX-69A, wherein Complainant sent e-mails to Barrow, Spratling, Eastis, Allen, Yancey, Bramlett, and Marsalla about not having timely funding information as late as June, and July, 2003. (CX-69A, pp. 1, 2, 19, 33, 46,

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[10] In its brief, Respondent contended that it provided Complainant with sufficient information to do her job by the assistance rendered by Allen, Bettencourt, Marsala, and Yancey combined with her access to web sites and her ability to contact Eastis. Respondent, however, ignores the fact that the information supplied Complainant even over the internet did not contain current balances, nor did it allow Complainant to track or associate cost to work performed. While Sheckell did approve contractor invoices, he unlike Complainant, had a computer background. However, even with that background he was unable to tell what bills went with what work. Eastis on the other hand, as Senior Manager for GSA responsible for applying funding to various tasks, testified that she did not track contractor costs on a monthly basis and that although she was unaware of anti-deficiency violation, Respondent had been short on funds on several occasions as late as June, 2003, and had to be reminded to increase funding. (Tr. 1664, 1680, 1681).

Respondent also contended that Barrow made the certification process possible by telling Complainant that she did not have to track cost to work performed. Rather, all she had to do in approving contractor invoices was to ascertain whether the hours of work billed by the contractors were reasonable, and if she had no reason to disbelieve what the contractors claimed, then she could approve such invoices. However, this approach relies upon an erroneous assumption that Complainant was in a position, either by training, experience or contact with work assignment managers, to know what work was done and how much time was reasonable to allocate to such work.

50). At the same time, Respondent was asking her to approve contractor invoices. (CX-69A, pp. 3, 4, 5, 10, 12, 14-17, 36-45). The lack of funding information not only caused Complainant's concerns about possible prosecution for Anti-Deficiency Act violations,[11] but also resulted in one of the major contractors (ACS Government Services, Inc.) withholding invoices for March, April, and May, 2003. (CX-69A, pp. 6, 9).[12] Withholding critical information necessary for job performance constitutes severe and pervasive harassment creating an abusive or hostile work environment.

II C. Surveillance and Criticism of Complaint's Attendance and Bathroom Habits (Allegation #1 and #16)

Complainant alleged that Supervisor Barrow improperly surveilled and falsely accused her of reporting for work late, not filling out a leave slip, and spending inordinate amounts of time in the bathroom. As of September 23, 2002, Complainant worked a compressed work schedule from 8:00 a.m. to 5:30 p.m., Monday-Thursday, and 9:00 a.m. to 5:30 p.m on Friday, followed by a second week working from 8:00 a.m. to 5:30 p.m., Monday -Thursday. (RX-7). On October 23, 2002, Complainant, with Barrow's permission, changed her schedule from 8:15 a.m. to 5:45 p.m. Monday- Thursday. (RX-78). On March 31, 2003, Complainant, with Barrow's permission, changed her schedule to 8:30 a.m.

[11] Respondent argued that Complainant failed to prove a violation of the Anti- Deficiency Act, and that such a violation occurred only when the amount of the obligation exceeded the amount available in an appropriation or fund. However, the test is not what constituted a violation of the Anti-Deficiency Act, but what Complainant reasonably believed to be a violation of the Act based upon information Respondent communicated to her about funding and expenditures. If Respondent knew there was no potential violation, why did it not respond to her numerous e-mails and advise her of that fact and tell her that in approving contractor invoices she would not be held accountable because funds were available for payment of contractor invoices?

[12] Eastis, Senior Contracting Officer for GSA, testified that she was responsible for putting IAG funding documents into the system when they were received and notifying EPA's, Contracting Officer, Spratling of such action. (Tr. 1660). Eastis recalled only one conversation with Complainant when she and Spratling came to her office and Complainant expressed concerns about approvals of contractor invoices. Eastis was aware of Complainant's concerns about Anti-Deficiency Action violations, but testified she was unaware of any violations or funding deficiencies. (Tr. 1662-1667). Eastis denied having conversations with Complainant concerning IAG funding and transfer of funds between old and new IAGs and also denied being told to withhold information on funding from Complainant. (Tr. 1669-1672). Eastis admitted that in June, 2003, funds came up short, but when she notified Respondent of that fact Respondent provided additional funds and in fact, will have to supply an additional $500,000 before the end of the term. (Tr. 1680-1682).

to 6:00 p.m., Monday-Thursday, 9:15 a.m. to 5:45 p.m. on Friday, followed by a second week where she worked from 8:30 a.m. to 6:00 p.m. Monday-Thursday and was off on Friday. (RX-7). [13]

The first record of any apparent tardiness came on July 1, 2002, when Barrow notes Complainant reported to work at about 10:00 a.m. (RX-26, p. 3). Barrow apparently took no action but in a mid-year appraisal on August 29, 2002, he brought up the issue of coming to work late with Complainant, who responded that she was in the bathroom. (RX-13). On February 6, 2003, Complainant apparently reported to work late, whereupon Barrow asked her to come to work on time and to provide him with written justification for her tardiness. (RX-27, p. 3). On February 18, 2003, Complainant e-mailed Barrow stating that she made up the time she was late by working additional time, and that she would not be missing work if it were not for health problems caused by EPA's harassment and hostile work environment. (RX-8). Barrow replied by asking Complainant to consider a flexible compressed schedule if her coming and leaving times were going to vary.

On March 19, 2003, Complainant missed a 9:15 a.m. meeting with contractors to discuss continuity of operations plans (COOP) in the events of emergencies (i.e., communications and security measures). The following day, Barrow questioned Complainant about her absence and gave her a leave slip to fill out for the missing time to which Complainant responded that she had been late because Respondent had sent her certified mail in this proceeding requiring her to go to the Post Office the previous morning, thus causing her to be late for work. (RX-6).[14]

On April 1, 2003, Complainant appeared at 9:40 a.m. for a scheduled 9:15 a.m. staff meeting and left when an employee, Phyllis Mann, in response to Barrow's comments about needing a clear path to the door, said to look out because Complainant was in the doorway. (RX-3, 4). On April 22, 2003, Barrow asked Complainant to fill out a leave slip when it appeared she was getting to work at 9:30 a.m. Complainant replied that she had been at work and was in fact coming from another employee's (Walt DiPietro) work area. (RX-1; CX-77).

Barrow has taken no adverse personnel action against Complainant because of her tardiness or suspected tardiness. (Tr. 1364). Rather, Barrow has left "Post It" notes on her door when he has been unable to find Complainant. (RX-14; CX-78). Barrow routinely uses "Post It" notes to notify other branch employees he has been looking for them. (Tr. 996-999). Barrow, moreover, did not consider Complainant's lateness to be a major problem and denied treating her different than other branch

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[13] As of October 2, 2002, Barrow thought Complainant was on a compressed tour working from 9:00 a.m .to -5:30 p.m., having previously requested work schedules from Complainant on September 12 and 17, 2002. (RX- 7, 10, 11). On March 25, 2003, Barrow learned from employee Dela Moore that Complainant had taken no leave in 2003. (RX-5).

[14] Complainant's absence from staff meetings was confirmed by Computer Specialist, James Couch. (Tr. 968). Couch, a Telecommunications Specialist, when question by Barrow about Complainant's lateness for work area, indicated that such was not an unusual occurrence. (Tr. 1001-1008).

employees or creating any impression of surveillance.[15] Barrow also denied questioning Complainant about her bathroom usage, but rather, testified that Complainant brought up the subject when he questioned her about being late..(Tr. 1000-1009, 1117, 1118).[16] Admittedly, Complainant spent several hours per morning in the bathroom due an irritable bowl syndrome that has gotten progressively worse since the RDO issued in September, 2002. (Tr. 1462-1465). Complicating matters further, Complainant has admittedly become more depressed, gained an additional 50 pounds, developed spinal arthritis, and has difficulty sleeping. (Tr. 1469, 1470).

Not only has Barrow taken no adverse personnel action against Complainant, he rated Complainant successful on her last annual evaluation of February 11, 2003, and noted a significant accomplishment by Complainant involving conceptualization and overseeing the writing of a Field Employee Training System computer program which allows all regions to track the health, safety, contracting and technical training requirements of their employees. (RX-19, p. 20; CX-71, p. 73).

After reviewing the entire record, the Court finds no credible evidence of improper surveillance or questioning by Barrow. Rather, it appears that Barrow was merely performing routine and necessary supervisor duties when questioning Complainant. Thus, I find no evidence of harassment and, in turn, no evidence of a hostile work environment.

II D. Idling, Bypassing and Undermining Complainant's Authority While Subjecting Her to Inappropriate Supervision (Allegations # 2 and #3)

Complainant alleged Respondent treated her as a figurehead concerning administrative office staff plan changes by letting contractors attend staff meetings and make requests through Barrow without allowing her the opportunity to first address those issues, while denying her the ability to make routine decisions, such as the best utilization of contractor resources of funds regarding information center support, floor support, and use of a labor pool to work on help desk tickets and subjecting her to inappropriate supervision by White.

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[15] Rather than disciplining Complainant for being late, Barrow asked Complainant to merely call and inform him when she was going to be late. (Tr. 1364, 1365, 1380). Respondent's attendance policy requires employees who are late to call in and explain why they are going to be late. (Tr. 1385-1388). The core hours of work are 9:00 a.m. to 3:00 p.m. Claimant has, on occasion, worked overtime and has not requested leave nor has she taken leave when late. (Tr. 1389-1391).

[16] Information management specialist, Carolyn White, testified that Barrow has left notes on her desk when trying to locate her. (Tr. 748,749). Telecommunication specialist also confirmed Barrow's practice of leaving notes when trying to locate employees. (Tr. 976-978).

On August 15, 2002, White, an Information Management Branch (IMB) Specialist, e-mailed IMB administrative officers (AOs), notifying them of an upcoming meeting to discuss methods for processing new employees. (RX-73; CX-76, pp. 10, 11).[17] On August 28, 2002, White e-mailed Complainant asking for information on the current staffing plan. (CX-76; p. 12). Complainant responded by e-mail on September 10, 2002. (CX-76, pp. 14). On September 10, 2003, Barrow held a meeting of AOs, including Complainant, where he discussed new employee processing, a staffing plan update, Microsoft Office, new PCs, cubicle numbering, and past accomplishments. (RX-72). Barrow told administrative officers (AOs) they would no longer be responsible for on-line security training with personnel taking over that function.

After this training was complete, the AOs were instructed to help with new employee login and instruct them on desktop features. Barrow then discussed updates on staffing, movement of PCs, use of Microsoft Office, accomplishments since the last staff meeting, and items to be accomplished such as AOs providing suggestions on staffing upgrades. Complainant attended this meeting. (RX-71). On September 11, 2002, Complainant e-mailed AOs suggesting a follow-up meeting. (CX-76; p. 26). The record does not show any follow-up meeting was held.

Complainant alleged Barrow authorized inappropriate supervision by fellow employee, Carolyn White. White is at the same pay grade level as Complainant and works in the Information Management Branch as a GS-12 information specialist. White testified without contradiction, that she is a work assignment manager in charge of an information center team and help desk, and is responsible for training other employees. White denied ever supervising or overseeing Complainant's work, rather, she has performed mere training functions and worked hand-in-hand with Complainant in giving contractors work assignments.

White admitted attending a meeting with Complainant the previous fall, during which she told administrative officers to be careful about entering accurate information on their programs, inasmuch as, that information is used in e-mail addresses, new employee processing, and Lan ID's. (Tr. 733-737). Further, she did not contact contractors directly without going through Complainant on issues such as work assignment changes or additional duties. (Tr. 746).

Regarding Barrow's action in inviting contractors to attend staff meeting's and letting contractors make requests through him, rather than going through Complainant, the record contains no credible evidence of any deliberate attempt by Barrow to have contractors circumvent Complainant. Barrow admitted to scheduling meetings with contractors, inasmuch as, he was the alternate Project Officer, but further, testified that he has always tried to schedule them at a time when Complainant could attend and met alone with contractors only when he could not locate Complainant. (Tr.1393, 1394).

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[17] Complainant alleged that Barrow improperly allowed White, who was at the same pay grade level as Complainant, to assume supervisory responsibilities regarding changes to the AOs program.

Concerning the allegation of denying Complainant the ability to make routine decisions, such as the best utilization of contractor resources for information center or floor support, or the use of the labor pool to work at help desks, Complainant sent Barrow an e-mail on November 26, 2002, indicating both short-term and long-term staffing plans, assigning information center work to employees Sharon P. and Melissa, with Rick Sheckell, developing justification for additional hardware support to include computer room printers, floor printers and juke box support, with the elimination of a hardware technician. (RX-70). Thereafter, a disagreement developed between Complainant and Sheckell, with Sheckell wanting to change the entire structure of the help desk/information center. When informed of the dispute, Barrow remarked that it was beginning to look like a turf war and suggested another meeting to work out a compromise. Complainant responded by telling Barrow she was being unjustly criticized for suggesting a compromise solution. (RX-22).

Regarding the issue of idling, Complainant testified without contradiction, that most of the time she has nothing to do, as opposed to contracting, where she frequently worked from 7:30 a.m. to 9:30 p.m. (Tr. 1643-1645, 1560). While Barrow has assigned Complainant meaningful work on a Region 4 Laboratory Information System (LIM) that created a normalizing database linking data so that tables from various projects could relate to one another on a Field Employee Training System (FETS) that tracked or kept records of persons who could be first responders in case of environmental or terrorist attacks, Complainant has enough work to keep her busy only 25 to 50% of the day. (Tr. 1309-1343, 1912, 1913; CX-70A, 71A, and 80).

After reviewing the entire record, the Court finds no credible evidence of Barrow either bypassing, undermining her authority or subjecting her to improper supervision. However, there is ample evidence that Complainant has been idled, in large part by Respondent. Evidence of the idling can be seen not only from Complainant's testimony, but also from the plethora of wordy e-mails Complainant generated on work time. Indeed, it is hard to imagine a person being fully occupied with job duties and generating the amount of vociferous e-mails which Complainant did. Idling constitutes adverse action in that it deprives a person, such as Complainant, of meaningful work thereby seriously changing the terms or conditions of her employment.

II E. Refusal to Implement any Provision of the September 24, 2002, RDO including Reassignment of Complainant to Contracting Duties while Filling a Frivolous Petition for Review of the September 24, 2002 RDO (Allegations #s 5, 6, 13)

Respondent readily admits that it has not implemented any provision of the September 24, 2002 RDO, but rather, has filed an appeal with the ARB while refusing to reassign Complainant back to contracting duties. Indeed, that was the testimony of Meiberg, Deputy Regional Administrator. (Tr. 224-227, 252). Respondent also admits that none of its administrators, including Meiberg, (Deputy Regional Administrator); Wright (Assistant Regional Administrator), Palmer (Regional Administrator), and Farmer (Deputy Assistant Regional Administrator) read the RDO, but instead, received a short briefing about the RDO from Respondent's Counsel, Karrol Berrien. (Tr. 220-222, 359, 452, 869).

Meiberg testified that Respondent assigned employees to jobs dependent upon agency needs and a determination how best to fulfill those needs. (Tr. 246). Meiberg admitted that Complainant's work status has remained the same as it was prior to the RDO. When asked why Complainant had not been reassigned to contracting, Meiberg pleaded ignorance of the reason except to say it was a management right and a question of need for her services. (Tr. 257, 258). Farmer testified that he knew of no reason why Complainant could not be reinstated to contracts. (Tr. 959). Barrow testified that he talked to Wright about reassigning Complainant in view of her ongoing complaints, suggesting she could be better used in another area but that Wright, who is over contracting, merely said he would have to revisit that issue. (Tr. 1353, 1354).

Indeed, Respondent has no rational or justifiable reason for keeping Complainant in the Information Management Branch as an Information Resources Coordinator, a position for which she is not fully qualified as set forth in *Erickson I,* and one in which the Project Officer is normally filled by a person with scientific or technical background. (Tr. 472). Considering the fact that Complainant neither has the ability to track funds, because of inherent deficiencies in both Respondent and GSA accounting systems, nor the ability to verify contractor compliance, because of a lack of technical expertise and a refusal of work assignment managers to communicate with her, it is apparent she has been given work that is impossible to perform. This leads to only one conclusion: Respondent is harassing Complainant in the hope that she will quit, thereby ridding itself of a loud vociferous and persistent Whistleblower. It is also apparent that supervisors above Barrow, including Wright, are responsible for this decision for while they have every right to appeal the RDO, they do not have the right to continue Complainant's harassment. Respondent's refusal to implement any recommended changes including a reassignment back to contracts, constitutes both adverse action and creation of hostile working conditions.

II F. False and Unfounded Criticism by Barrow (Allegations # 8, 12 and 15)

Complainant contends that Barrow, during her annual evaluation, falsely criticized her of accusing employee Tom Ferris of illegal activity and later on March 19, 2003, falsely accused her of not following instruction by failing to tell contractors about COOP and Shelter-In-Place instructions. On February 11, 2003, during her annual evaluation, Barrow, according to Complainant, [18]accused her of stating that fellow employee Tom Ferris had done something illegal.

On February 19, 2003, Complainant e-mailed Barrow and denied any such accusations, stating she was merely "guessing" why the Region had purchased a commercial product that now needed additional programing, instead of writing its own program. Complainant told Barrow that Ferris had recommended the product because the server was bigger than needed and could be used for additional GIS work. (CX-76; p.1). On January 30, 2003, Ferris e-mailed Barrow telling him that the server and

[18] Wright's predecessor was Mike Peyton. Wright replaced him in November, 2002, as part of a national rotation directed by EPA headquarters. (Tr. 357).

software were procured with discretionary funding for environmental incident tracking and did not involve GIS components or activities, and that not only himself, but 4 other employees, were impressed with the product's ability to compete with Footprints, was fully customizable and was web- based with the ability to send and receive e-mail. (RX-61).

On March 19, 2003, Barrow questioned Complainant on several occasions about whether she had relayed instructions to contractors about COOP and Shelter-in-Place. When Complainant assured Barrow she had relayed the instructions, the matter was dropped. However, Barrow was apparently upset with Complainant because earlier that morning she had missed a meeting with contractors where COOP and security measures were discussed. (RX-6).

After reviewing the entire record, the Court finds no credible evidence of Barrow making false accusation against Complainant and thus harassing her. Moreover, even assuming the criticism was false, it certainly was not severe and pervasive so as to alter Complainant's terms and conditions of employment.

II G. The November 6, 2002 Meeting Conducted by Wright (Allegation #7)

On November 5, 2002, Janice Fowler sent an e-mail to all policy and management personnel including facilities, financial and information technology, and civil rights employees, advising that Wright would conduct a meeting of all hands the following Wednesday, November 6, 2002, in the 9th floor conference room at 1:30 p.m. (RX-76). On the following day, Wright held the meeting as scheduled with about 100 employees in attendance.

Wright testified that he told all employees they would be accountable for carrying their own weight and working as a team; what occurred in the past was history and his objective was to move forward. (Tr. 355, 356, 432-437). Wright stated that he was not going to take responsibility for what happened in the past when he was not in charge. Wright admitted that Complainant asked questions, but could not remember what was asked, although he did remember saying he wanted to start off with a clean slate, referring to himself as a new coach. (Tr. 360-364). Wright denied being rude and stressed again his objective was to start with a clean slate. (Tr.403-408, 432-437).

Robbins, Chief of Grants and Procurement, testified that Wright opened the meeting, which was attended by 100 Office of Policy and Management employees, by thanking his predecessor, Mike Peyton, the previous Assistant Regional Administrator, announcing new leadership, and reading word-for-word a memo he had sent out previously to divisional employees.[19] Wright referred to Region 4's Office of Policy and Management as a team with himself the coach bringing in a new, innovative style. Wright asked employees to give him a chance. Robbins testified that Complainant was present and asked "what if people basically have set their mind in such a way that it will not allow me to do whatever work I'm supposed to be doing, you know, what about that, Mr. New Leader?" Wright

[19] Wright's memo was never produced or made an exhibit.

replied; "Give me a chance to do my job" and said that if employees did not like the job they were doing, they needed to talk to management and seek another job. Robbins testified that another employee asked a question, but he, was unable to recall specifics and denied hearing any negative or humiliating remarks. (Tr. 1712-1729).

Complainant testified that Wright introduced himself and said he expected all employees to be part of, and support the team, forgetting the past and bringing suggestions to him if their managers did not listen. Complainant asked what Wright was going to do to build up employee confidence and show that Respondent would not retaliate when former Deputy Regional Administrator, Pat Tobin, had said Respondent was an unforgiving agency. Wright replied that Complainant would simply have to trust him, that there was going to be a new way of doing business. Employee Marlin Brinson then asked what Wright was going to do to resolve ongoing problems from the past to which Wright stated that what was in the past is in the past and should be dropped, and if they did not it would be to their detriment. (Tr. 1508-1512). [20]

Having reviewed the entire record, the Court finds that Wright told employees he would address only those issues which arose after his appointment as ARA ,and that employees who held onto the past would do so to their detriment. Further, he told Complainant and other employees to seek another job if they did not like their present assignment. Such comments were perfectly consistent with Respondent's action in refusing to accept responsibility for management's adverse actions against Complainant and also constituted a threat of retaliation directed at employees, such as Complainant, for refusing to abandon prior discriminatory charges. Such comments, although limited in duration, were harassing and pervasive, leaving about 100 employees with an understanding that management would not condone employees engaging in protected activity and thereby creating a hostile work environment.

II H. Refusal to Transfer Complainant to Contracting Specialist Positions (Allegation # 17)

In April, 2003, Respondent through its personnel office, posted two job vacancy announcements for GS-11/12 contract specialists with a salary range of $47,639.00 to $74,336.00. The period for

[20] Complainant's Counsel called employee, Rafael Santamaria, to testify about the November 6, 2002, meeting. Santamaria had served as an EEO officer from 1991 to January, 2000, when Respondent posted the position as a GS-13 and selected another candidate other than Santamaria. Santamaria's testimony had very little to do with the November 6 meeting, except to say that both he and Complainant were upset, because Wright had refused to address problems that were pending prior to his appointment. (Tr. 485, 486, 507). Santamaria testified that he feared retaliation from Respondent because of his testimony, and said he believed he had been removed as EEO officer by Peyton and Meiberg in January, 2000, because of 40 EEO complaints he had brought to their attention and failed to resolved. Santamaria testified that he brought suit against Respondent when he was not selected for a GS-13 EEO officer position, but lost the suit for failure to prosecute. (Tr. 587-511).

applying was from April 16-29, 2003. Candidates were required to submit various documents with their application, including a college transcript showing that the employee met the education requirements of the position. The education requirements included a 4 year course of study leading to a bachelor's degree with a major in any field, or 24 semester hours in a variety of fields from accounting, business, or law to organization and management, or graduate education in such fields. Employees holding GS-1102 positions were considered to have met this requirement "for positions they occupy on January 1, 2000." (CX-72). Complainant applied for these positions, but did not submit a copy of her college transcripts and did not occupy or hold a GS-1102 position.

Personnel Staffing Specialist, Maurice Holmes, processed the applications for these positions but did not put Complainant name on a certified list of eligibles because of Complainant's failure to include her college transcripts. (Tr. 800-808). Holmes testified, that even if an applicant had a copy of his/her college transcript in their personnel file, he would not certify them as eligible, because the announcement requires a submission with the application. Further, the same procedure is followed by all other staffing specialist in Respondent's region. (Tr. 834, 841). In Complainant's case he treated her like all other applicants and coded her as failing to comply and did not look further at her application. (Tr. 853-855). Holmes' action in not certifying Complainant, constitutes adverse employment action, in that it prevented her from being considered for a contract specialist position.

Complainant argues, that had she been reinstated to contracts, she would have been in a GS-1102 position, and thus, would have been on a certified list of eligibles and presumably selected for one of the two contract specialist positions. However, as of the hearing date Mills had made no selection for anyone of these positions and could not consider Complainant since she was not on the certified list. (Tr. 694, 695). Mills testified that Complainant would be selected for one of these positions if she was on a certified list and was found to be the most qualified. (Tr. 706). However, he did not think that if Complainant was reinstated to contracts that they would have a good working relationship because of Complainant's general disregard for management and his belief that Complainant does not think he (Mills) is entitled to his present position. (Tr. 720-724).

As the record stands, the Court finds no evidence to suggest that Holmes intentionally discriminated against Complainant because of her protected activities. Holmes treated Complainant like any other applicant. However, it is also clear that had Respondent restored her to a contracting position, it would not have been necessary for Complainant to supply a college transcript in order to be placed on a certified list of eligibles. (Tr. 828). By excluding her from that list, Respondent perpetuated and continued its discrimination against Complainant as found in *Erickson I.*

III. Confiscating Nine Hours of Annual Leave Effective May 8, 2003 (Allegation # 18)

On May 21, 2003, Complainant learned that Barrow had charged her with leave for missing work May 8, 2003. Previously, Complainant had requested, and Barrow had approved, annual leave for May 6 and 7, 2003. Barrow expected Complainant to be at work on May 8 , 2003, inasmuch as, she had not requested leave for that date, nor called in to explain her absence. Barrow did not learn

of Complainant's absence until a dispute arose between two contractor employees and a male EPA employee requiring Complainant's assistance.

Since Complainant failed to either call in or request leave for May 8, 2003, Barrow assumed Complainant was taking an additional day of annual leave. The following day, Friday, May 9, 2003, was a scheduled off day for Complainant, who worked a compressed schedule of 8:30 a.m. to 6:00 p.m., Monday through Thursday. Barrow had no further contact with Complainant until the following Monday, May 12, 2003, when she telephoned him requesting a schedule change with her day off being changed from Friday to Monday. Barrow approved Complainant's request and asked Complainant whether she had come to work on May 8, 2003. Complainant responded that she had come by the office at 6:00 p.m. to deliver pre-hearing submissions to Respondent's Counsel. Barrow took this response as confirmation of the fact that she taken an extra day of annual leave on May 8, 2003 and charged her leave for that day. (Tr. 1803-1817, 1837, 1882).

Complainant was in trial before the undersigned on May 13 through May 16, 2003. On May 19, 2003, Barrow left a voice message for Complainant telling her he had charged her with annual leave on May 8, 2003, but that if she requested administrative leave for that day he would see about getting it approved. On May 21, 2003, Barrow reminded Complainant of the voice message he had left for her. Complainant responded that she had worked at home on FETS 5 hours each day of her annual leave, May 6 and 7, 2003. Barrow asked her to e-mail him detailing the work she had performed on those days and he would review what she said and amend her time card accordingly. Barrow further stated that he could not read her mind and it was her responsibility to notify him what she was doing. (Tr. 1838-1840).

On June 6, 2003, Complainant e-mail Barrow detailing the work she had done on May 6, and 7, 2003. Barrow reviewed her response and amended her time card showing Complainant in duty status from May 6 through May 8, 2003.

Respondent contends that Barrow initially charged Complainant annual leave not in retaliation for protected activities, but only because Complainant failed to request leave in advance and to notify Barrow that she was not coming to work on May 8, 2003. (RX-83). Charging or taking away annual leave constitutes adverse action. However, there is no evidence to suggest any discriminatory conduct by Barrow in initially charging Complainant with annual leave. Rather, the record shows and the Court finds that Barrow had ample reason to believe that Complainant was taking another day of annual leave on May 8, 2003, and thus, was justified in initially charging her with annual leave on that day.

III. DISCUSSION

No employer, subject to the provisions of the whistleblowing statutes, "may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee . . . engaged in any [protected

activity]." 29 C.F.R. § 24.2(a) (2001). A complainant has thirty days from the time of the employment action to file a complaint. 29 C.F.R. § 24.3(b) (2001). To establish a *prima facie* case of discrimination under Whistleblower statutes, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;

2. The complainant engaged in protected activity under the act;

3. The employer took adverse action against the employee;

4. The employer knew or had knowledge that the employee was engaging in protected activity; and,

5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

See American Nuclear Resources, Inc. v. U.S. Department of Labor, 134 F.3d 1292, 1295 (6th Cir. 1998); *Kahn v. U.S. Secretary of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to evaluate the credibility of the witnesses and to weigh the evidence. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 466 U.S. 844, 855, 102 S. Ct. 2182, 2189, 72 L. Ed. 2d 606 (1982). When the proof of ones case depends on subjective evidence, a credibility determination is a critical factor and the ALJ should explicitly discredit such testimony or the fact that the evidence is incredible must be so clear as to amount to a specific credibility finding. *Tieniber v. Heckler* 720 F.2d 1251, 1255 (11 Cir. 1983); *Bartlik v. Tennessee Valley Authority*, 88 ERA 15 (Sec'y Dec 6, 1991).

III A. Coverage, Protected Activity, and Knowledge of Protected Action

The issue of jurisdiction or more properly whether Respondent and Complainant were subject to the employee protection provisions of SDWA, WPCA, SWDA, CAA, and CERCLA, was previously found in *Erickson I*, at p. 53, fn. 82. The issue of Complainant's protected activity was discussed at length in *Erickson I***,** pp. 59-61 and included: (1) voicing concerns to co-workers and management about Superfund environmental regulations, analytical procedures, policies and practices that wasted funds, and created impossibility of performance issues that retarded the environmental clean up of the Southeastern Superfund site in 1993, (2) interfering in the bidding process for the North Cavalcade Superfund site to change analytical methodology and performance standards in an attempt to eliminate an impossibility of performance issue that would retard environmental cleanup, (3) writing letters to Congress concerning the OIG investigation of her that was opened in part because of her involvement in the North Cavalcade Superfund site, (4) filing whistleblowing complaints and taking environmental

concerns to the media, and (5) sending information to Congress regarding possible FOIA violations concerning the destruction of e-mail back-up tapes.

In this case, there is no question that Respondent and its supervisors were either directly involved with the events of *Erickson I* or were e-mailed copies of the RDO and/or briefed by Respondent's Counsel about the RDO so as to establish knowledge of Complainant's activities. The only remaining question deals with whether Respondent took adverse action against Complainant and if so, Respondent's motivation.

III B. Adverse Action

Regarding the issue of adverse action an employer violates a whistleblowing statute when the covered employer "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates against any employee. . . ." 29 C.F.R. § 24.2(b) (2002). The Eleventh Circuit discerned a difference between discrimination and adverse action, defining adverse action as "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone and Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). To be actionable, adverse actions must be more than a mere inconvenience or an alteration of job responsibilities. *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Thus, memoranda of reprimand or counseling that amounts to no more than a mere scolding, without any following disciplinary action, do not rise to the level of adverse action. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1236 (11th Cir. 2001); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066 (ARB Aug. 28, 2001). To be adverse action, the activity must result in a tangible job consequence that a reasonable person under the circumstances would view as a "serious and material change" in the terms, conditions, or privileges of employment.[21] *Davis*, 245 F.3d at 1139-40. A "serious and material change," however does not

[21] In *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, p. 7 (March 30, 2001), the ARB stated:

> The Secretary and this Board often have been guided by cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§§§2000 *et seq*.("Title VII"), where the language used in Title VII is similar to that used in the employee protection provisions of the whistleblower statutes. *See Hobby v. Georgia Power Company*, ARB Nos. 98-166/169, ALJ No. 90-ERA-30, slip op. at 16 and 26 (ARB Feb. 9, 2001). The employee protection provisions of the CAA, TSCA, SDWA, and the ERA all state "[n]o employer may discharge or otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." Because Title VII utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin, we have looked to cases decided under Title VII for guidance regarding the meaning of this phrase. *Martin v. Department of the Army*, ARB No. 96-131, ALJ No. 93-SWD-1, slip op. at 7 (ARB July 30, 1999).

have to constitute an ultimate employment decision. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11 Cir. 1998).

Instances of adverse action in *Erickson I* included: 1) reassignment of the Southeastern and Bechtel contracts, demoting Complainant to a contract specialist, detailing her out of the Procurement Section and into the Grants Section, and denying her a promotion through a desk audit; 2) canceling Complainant's contract warrant, transferring Complainant out of her career field and into the Information Management Branch, opening an OIG investigation, issuing a "gag order," and stealing her property; 3) Respondents' refusal to disclose the results of the OIG investigation to Complainant so that a final determination of her actions hung over her head like the "sword of Damocles;" and 4) placing Complainant in a dead-end job that she was not qualified to perform.

In *Erickson I1*, instances of adverse action include Respondent's action in: (1) refusing to reassign Complainant to contracts while insisting that she perform Project Officer duties approving contractor invoices when she has neither the technical knowledge to understand and evaluate the work performed by computer contractors nor the communication with work assignment managers who refuse to talk with her concerning contractor performance, nor the necessary information from contractor invoices, GSA and EPA accounting systems to properly track cost and work performed, (2) deliberately withholding information from Complainant on fund balances making it impossible to discern if she is violating the Anti Deficiency Act by approving work without necessary funding, and (3) refusing to place Complainant on certified lists of eligibles for contract specialist positions for which she applied in April, 2003 .

Adverse employment action can include the creation of a hostile work environment. *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995) (finding a hostile work environment when employees were instructed not to talk to the complainant, called the complainant "inept" and a "s.o.b." and the prevailing attitude was a "loss of trust" directed toward complainant). The Secretary of Labor approved of importing the concept of hostile work environment from employment discrimination cases based on race and sex in violation of Title VII of the Civil Rights Act of 1964 in to the whistleblowing statutes. *Varnadore v. Oak Ridge Nat'l Laboratory*, 92-CAA-2 (Sec'y Jan. 26, 1996) (reissued with non-substantive changes on Feb. 5, 1996). Unlike adverse employment action a tangible job detriment is not a required element in a hostile work environment case. *Id*. at 92, n.93. Accordingly, to prove the existence of a hostile work environment, in the Eleventh Circuit, a complainant must show:

(1) The employee belongs to a protected group;

Accordingly, I am guided by the Eleventh Circuit case law under Title VII as to what constitutes adverse action. The most recent expression of what constitutes actionable adverse action in the Eleventh Circuit is that the action must amount to a "serious and material change" in the terms, conditions, or privileges of employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-40 (11th Cir. 2001).

(2) The employee was subject to unwelcome harassment;

(3) The harassment was based on a protected characteristic of the employee;

(4) The harassment was severe or pervasive enough to alter the terms and conditions of employment to create a discriminatorily abusive working environment; and

(5) The employer is responsible through either direct or vicarious liability.

Miller v. Kentworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). *See also Rojas v. Florida*, 285 F.3d 1339, 1344 (11th Cir. 2002) (stating that to establish hostile working environment a plaintiff must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.") (citation omitted).

In the present case, there is no question that Complainant has been required to work under adverse and hostile working conditions, in that Respondent has required her to perform Project Officer duties which include the approval of contractor invoices, knowing that she was unable to verify such cost due to a lack of technical training, communication from work assignment managers and incompatible GSA and Respondent accounting systems. Complainant was required to authorize payment without knowledge of fund balances, and thus, a valid concern that she would or could be prosecuted for violations of the Anti-Deficiency Act, 31 U.S.C. § 1341 *et. seq.*[22]

III C. Animus or Discriminatory Motivation

An employee can prevail in showing that adverse employment action was motivated by protected activity where there is direct evidence of discrimination. *TWA v. Thurston*, 469 U.S. 111, 121 (1985); *Walker v. Prudential Property & Casualty Insurance Co.*, 286 F.3d 1270, 1274 (11 Cir. 2002). Direct evidence of discrimination is evidence that "will prove the particular fact in question without reliance on inference or presumption." *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir. 1999). Such "evidence must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." *Id*.

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[22] Section 1341 (a)(1) (A) of The Anti-Deficiency Act prohibits officers or employees of the U.S. government authorizing expenditures which exceed amounts appropriate for the fund or obligation in question. Section 1518 of the Act subjects the individual who authorizes excessive expenditures to administrative discipline including suspension without pay or removal from office. Section 1519 of the Act further provides that an officer or government employee who knowingly and willfully violates the Act by authorizing excessive expenditures shall be fined not more than $5,000.00 and imprisoned for not more than 2 years or both.

In the absence of direct evidence of discrimination, a complainant makes out a *prima facie* case of retaliation by showing that: (1) he or she is a member of a protected class; (2) he or she engaged in protected activity; and (3) respondent took adverse action and had knowledge of his or her protected activity. The threshold for establishing a prima facie case is low and the amount of evidence needed is "infinitely less than what a directed verdict demands." *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 2751, 125 L. Ed. 2d 407 (1993).

Once a complainant establishes a *prima facie* case of retaliation the burden then shifts to the respondent to produce legitimate nondiscriminatory reasons for taking the adverse employment action. *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000); *Walker v. Prudential Property & Casualty Insurance Co.*, 286 F.3d 1270, 1274 (11 Cir. 2002). *C. f.* 42 U.S.C. § 5851(b)(3)(B) (2002) (stating that in ERA cases the employer must show by "clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence" of any protected activity); *Dysert v. United States Secretary of* Labor, 105 F.3d 607 (11th Cir. 1997). The respondent's burden is one of production and not of persuasion. *Reeves*, 530 U.S. at 142-43.

When a respondent offers legitimate nondiscriminatory reasons for taking the adverse employment action, the presumptions and burden disappear leaving complainant with the ultimate burden of persuasion by a preponderance of the evidence to show that the respondent's actions were motivated by a retaliatory animus. *Reeves*, 530 U.S. at 143; *Hicks*, 509 U.S. at 516 (explaining that the complainant's burden to attack the legitimate nondiscriminatory reasons set forth by the respondents merges with the ultimate burden of persuading the court that the complainant is the victim of intentional discrimination). A complainant may meet the ultimate burden of persuasion through circumstantial evidence. *Bartlik v. Tennessee Valley Auth.*, 88 ERA-15 (Sec'y April 7, 1993), *aff'd sub. nom. Bartlik v. U.S. Dept of Labor*, 73 F.3d 100 (6th Cir. 1996). When using circumstantial evidence, however, the complainant must show intentional discrimination. *Leveille v. New York Air Nat'l Guard*, 94-TSC-3 (Sec'y Dec. 1, 1995).

Because this case was fully tried on the merits, I find it appropriate to combine a full analysis of Complainant's *prima facie* case of retaliatory animus with Respondents' burden to show legitimate nondiscriminatory reasons for undertaking adverse employment action with Complainant's ultimate burden of persuasion. *See Adjiri v. Emory University*, 97 ERA 36, p. 6 (ARB July 14, 1998) (stating that it is not necessary to go through the burden shifting analysis once the respondents show a legitimate nondiscriminatory reason for undertaking a personnel action, rather the question is whether the complainant prevailed on the ultimate question of liability); *Ilgenfritz v. United States Coast Guard Academy*, 99 WPC 3 (ALJ March 30, 1999).

In this case, Respondent provided no legitimate nondiscriminatory reason for requiring Complainant to perform Project Officer duties, when it knew or should have known, that Complainant was not competent to perform such duties due to a lack of technical training, little or no communication with work assignment managers, poor accounting systems that did not permit a tracking of funds and withholding of information necessary to establish fund balances. Respondent placed Complainant in an

untenable situation in which she was not able to verify cost or fund balances, and thus, face potential criminal and civil charges under the Anti-Deficiency Act.

While Respondent had every right to appeal the previous RDO, it had no legitimate reason to simply keep Complainant in the same position she occupied after her transfer into the Information Management Branch. Respondent provided no legitimate reason for idling Complainant, nor any legitimate reason for telling employees that they should drop their past disputes with Respondent or else face adverse consequences. Moreover, Respondent provided no legitimate reason for failing to place Complainant on a certified list of eligibles for contract specialist positions.

III D. Remedy

In its brief, Complainant seeks multiple remedies from establishment of a non-hostile work environment; purging of derogatory information from Respondent's files; flexiplace to accommodate her disabilities; reinstatement in contracting to a comparable level of Keith Mills; removal of every manager found substantially responsible for retaliation; joint and several liability of individual managers for damages; back pay, front pay, restoration of sick and annual leave; restoration of time lost due to a refusal to provide official time; $2.5 million in compensatory damages; exemplary damages of $2.5 million, legal fees and expenses; notices to employees informing them of their rights under environmental whistle blower laws; cease and desist orders; injunctive relief; orders requiring mandatory meetings of all employees to allow Respondent to apologize to Complainant and provide for appropriate sensitivity training; orders requiring Respondent to cease and desist from unlawful surveillance and referring appropriate managers to the Justice Department, FBI, and DOL Office of Inspector General for investigation of possible violations of 5 U.S.C. § 1505, 1512, and 1513.

Having reviewed the previous RDO in *Erickson I*, the Court finds it appropriate to reissue that Order requiring Respondent to reinstate Complainant to a GS-13 contract officer position effective March 10, 1995, with back pay from that date to present including timely step increases plus interest on that amount in accord with the rate employed by the United States District Courts under 28 U.S.C. § 1961. In addition, the Court finds compensatory damages in the amount of $50,000 to be appropriate along with exemplary damages in the amount of $225,000, with a thirty day notice posting throughout Region 4's facilities in Atlanta, containing a short summary of these proceedings setting forth Complainant's protected activity, Respondent's discriminatory action and the remedy found appropriate herein, together with Respondent's recognition of the right of employees to engage in whistleblowing activities free of retaliation. In addition to a notice posting, Respondent shall provide and require its managers to attend meetings, wherein it will provide training on compliance with environmental whistleblowing laws.

III. E Attorney Fees and Costs

Attorney's fees are available to the prevailing Complainant as authorized by statute. SDWA, 42 U.S.C. § 300j-9(i)(2)(B); WPCA, 33 U.S.C. § 1367(c); SWDA, 42 U.S.C. § 6971(c); CAA 42 U.S.C. § 7622(b)(2)(B); and CERCLA 42 U.S.C. § 9610. No award of attorney's fees for services rendered on behalf of the Complainant is made herein since no application for fees has been made by the Complainant's counsel. Counsel is hereby allowed thirty (30) days form the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Complainant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W. Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).